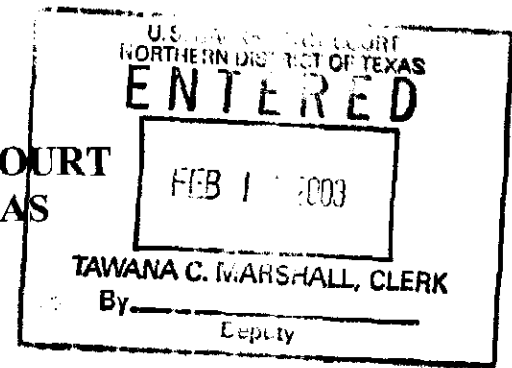


UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION



IN RE:

LESTER LAWAYNE GIVENS

Debtor

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Case No. 02-71002 HDH-13

LESTER LAWAYNE GIVENS

Plaintiff,

v.

AUTO EMPORIUM and
MONTY VAN DYKE

Defendants.

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Adversary No. 03-7001

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Federal Rule of Bankruptcy Procedure 7052, the Court enters the following findings of fact and conclusions of law:

A. Findings of Fact

1. On or about October 24, 2002, the parties¹ to this proceeding entered into a contract for the purchase of a 1993 Ford F350 wrecker ("Purchase Agreement"). (Pl.'s Ex. A; Def.'s Ex.1.)

On that date, the parties also entered into a Retail Installment Contract and Security

¹ Defendant Monty Van Dyke admits that he is the real party-in-interest and that Auto Emporium is not a proper defendant. Defendant Van Dyke (hereinafter "Defendant") submits to the jurisdiction of this Court and agrees that he is the proper defendant.

Agreement (“Retail Contract”). (Def.’s Ex. 2).

2. The purchase price for the vehicle was \$10,500. (Pl.’s Ex. A.) The total price for the vehicle was \$11,300 including tax, title, license and registration fees. (*Id.*) The Purchase Agreement states that the down payment equals \$4,750. (*Id.*) Plaintiff paid a down payment of \$4,000 on or about October 24, 2002, with a remaining down payment of \$750, representing most, but not all, of the taxes, license fee, title fee, and a documentary fee.
3. Although title to the wrecker has never been transferred to Plaintiff, on or about October 24, 2002, Plaintiff was given possession of the wrecker. Plaintiff admits that the remaining \$750 down payment was never paid to Defendant.
4. The Retail Contract signed by Plaintiff required a payment on November 24, 2002 of \$393.37. (Def.’s Ex. 2.) Plaintiff admits that he did not remit the November 24, 2002 payment.
5. The Retail Contract also provides that Plaintiff must provide proof of insurance with a collision coverage deductible equal to or less than \$500. (*Id.*) Plaintiff admits that his insurance, as of the date of trial, carried a \$1,000 deductible.
6. In the early morning hours of November 30, 2002, the wrecker was repossessed. Plaintiff filed his bankruptcy petition on December 6, 2002. Defendant and/or a party-in-interest connected to Defendant was notified of the bankruptcy petition sometime thereafter, but in any event no later than December 10, 2002. (*See* Pl.’s Ex. E.)
7. On December 13, 2002, Defendant’s counsel made the following representation to Plaintiff and/or his counsel:

Mr. Van Dyke has not willfully violated any provision of the automatic stay.
Mr. Van Dyke and the Auto Emporium caused Mr. Given’s Wrecker to be

repossessed. I use the term “Mr. Givens’ wrecker” advisely [sic] since he never complied with the contract necessary to obtain title to the vehicle. Furthermore, until after the bankruptcy was filed, we had not received proof of insurance and even the insurance that we have received has a deductible in excess of the contract amount and does not name Mr. Van Dyke or his company as the lien holder.

Assuming that you can cure the above deficiency and adequately provide for the payment for the property pursuant to the Plan however Mr. Givens is entitled, as far as we are concerned at the present time, to receive the vehicle.

* * *

[I]f Mr. Givens desires to obtain the vehicle we will make it available to him at its present location. Mr. Givens will have to have another wrecker or tow truck [to remove the wrecker from its present location.]

(Pl.’s Ex. F.) This correspondence was copied to the Defendant.

8. On December 19, 2002, Defendant’s counsel notified Plaintiff’s counsel via facsimile that the wrecker was available for pickup. (Pl.’s Ex. G.) The correspondence indicated that it was copied to Defendant and expressly requested that the Defendant notify the party that was holding the vehicle, an impound lot that is either owned by or associated with Defendant, to release the vehicle. (*Id.*) Defendant’s counsel later represented to the Court that the correspondence was sent to his client, but was sent via regular mail.
9. On December 21, 2002, Plaintiff sent a tow truck to the impound lot to pick up the wrecker. Plaintiff’s representative was denied possession of the vehicle. The reason given, on that date, was that the impound lot had not received a release from Defendant. Plaintiff paid a towing company \$571 for its attempted recovery of the wrecker.
10. In the December 19, 2002 letter, Defendant also made demand for proof of insurance. Pl.’s Ex. G.) Defendant further demanded that Plaintiff amend his plan of reorganization to include the \$750 down payment that remained unpaid. (*Id.*) In the alternative, Defendant

proposed that Plaintiff make direct payment of the \$750 to Defendant prior to confirmation of any plan. (*Id.*)

11. Defendant still has possession of the wrecker. Plaintiff has not attempted to pick up the vehicle after the December 21, 2002 attempt.

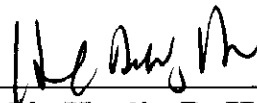
Conclusions of Law

1. 11 U.S.C. § 362(h) provides that “[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.” Section 362 provides, in relevant part an automatic stay against “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a)(3).
2. Property of the estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). At the time the Plaintiff’s bankruptcy was instituted, he held, at a bare minimum, an equitable interest in the wrecker.
3. As such, Defendant was required to turnover the property of the estate or the value of such property, and proceed with his rights in the bankruptcy case, i.e. seek a lift of the automatic stay, the filing of a proof of claim, etc. *See* 11 U.S.C. § 542(a).
4. Nevertheless, the automatic stay also applied to bar the Defendant from exercising any other control over the wrecker. Defendant violated the automatic stay by refusing to turnover the vehicle once the Defendant was made aware of the bankruptcy. Defendant had numerous opportunities to turnover the vehicle, but has failed to return the wrecker to Defendant.
5. Accordingly, the Court finds that Defendant violated the provisions of 11 U.S.C. § 362(h).

Defendant shall either remit \$571 to Plaintiff to reimburse Plaintiff for the costs of the failed recovery attempt or shall deliver the wrecker to Plaintiff at Plaintiff's place of business within 2 days of entry of this order, at or before 5:00 p.m. on that date.

6. Further, Defendant is ordered to either pay \$750 in damages or, in the alternative, immediately take all steps necessary to place title of the wrecker in the name of the Plaintiff. In the event Defendant elects to transfer title immediately, the \$750 judgment will be applied to the remaining unpaid portion of the Purchase Agreement.
7. Defendant shall also remit \$1,000 to Plaintiff to reimburse Plaintiff for his attorney's fees.
8. Plaintiff is ordered to begin making timely payments on the wrecker pursuant to the Retail Contract directly to Defendant. To the extent 2 post-petition payments have been missed, Plaintiff shall make such payments within 60 days of the entry of judgment in this matter. Plaintiff is further ordered to provide proof of insurance in compliance with the terms of the Retail Contract within 10 days of entry of judgment in this matter. Until such time as the proof of insurance is obtained by Plaintiff, Plaintiff is barred from operating the wrecker in any manner.
9. In the event Plaintiff fails to comply with any of the foregoing terms, the automatic stay will lift upon the filing of a motion and an affidavit by Defendant swearing to or affirming the specific violation of the judgment without further hearing before the Court.

SIGNED: 2/10/03



The Honorable Harlin D. Hale
United States Bankruptcy Judge